

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2003-000083-001 DT

11/04/2003

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED: _____

STATE OF ARIZONA

GARY L SHUPE

v.

MARK E BAROODY (001)

JAMES N HANKEY

PHX CITY MUNICIPAL COURT
REMAND DESK-LCA-CCC

MINUTE ENTRY

PHOENIX CITY COURT

Cit. No. #8968260

Charge: 1. DUI-LIQUOR/DRUGS/VAPORS/COMBO

DOB: 12/16/57

DOC: 02/03/01

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This Court has reviewed the record of the proceedings from the Phoenix City Municipal Court, and the memoranda submitted by counsel.

This court's review of the trial judge's ruling and conclusions of law on Appellant's Motion to Dismiss are made *de novo*.¹ This court must review the trial judge's ruling on such a

¹ *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 927 P.2d 776 (1996); *State v. Johnson*, 184 Ariz. 521, 911
Docket Code 512

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motion to suppress using an abuse of discretion standard. That is, this court should reverse only when it finds that the trial judge abused his or her discretion.²

Appellant, Mark E. Baroody, was arrested on February 3, 2001, and charged with a violation of A.R.S. §28-1381(A)(1), DUI – Drugs. Two arresting officers witnessed Appellant’s slurred speech, bloodshot eyes and apparent confusion. Appellant told the officers that he had been drinking and that he had taken Demerol, Percocet, and Valium. Appellant was processed in a DUI van, where he was asked the standard DUI questions while being videotaped. When Appellant received the videotape of the questioning, the tape was of very poor quality. Appellant filed a Motion to Dismiss based on allegations that Appellant had been unconstitutionally denied meaningful and highly exculpatory evidence. On November 7, 2002, a hearing was held before Judge James Carter of the Phoenix Municipal Court. At the hearing, Officer Lee Campbell testified that he conducted the videotaped interview of Appellant in the DUI van, and saw no signs of Appellant’s drug impairment. The judge denied the Motion to Dismiss, finding that: 1) the State did not act in bad faith; and 2) Appellant was not prejudiced because Officer Campbell could testify as to Appellant’s signs of impairment, or lack thereof. Appellant now brings the matter before this court.

Appellant asserts that the poor quality of the videotape of him being questioned in the DUI van constitutes a “loss” of exculpatory evidence, and therefore, the charges should have been dismissed against Appellant. Appellant cites *State v. Hannah*,³ which states in relevant part:

We concluded that where there has been a loss or destruction of evidence we would reverse a defendant's criminal conviction if (1) bad faith or connivance on the part of the State can be shown or (2) a defendant was prejudiced by loss of evidence....⁴

Hannah does not support Appellant’s cause, for *Hannah* presupposes that there has been a loss or destruction of evidence. Appellant has failed to show that evidence of Appellant’s condition was lost or unpreserved, for Officer Campbell could have testified at the hearing concerning Appellant’s signs of impairment in the DUI van. Appellant’s objection isn’t to the evidence of his mannerisms and behavior in the DUI van, but to the fact that such evidence does not exist on videotape. Appellee correctly argues that Appellant does not suffer prejudice simply because evidence is not available to him in the form he would prefer.

Appellant failed to support his claim of bad faith – the first requirement of *Hannah* – as Officer Campbell testified that he thought the video camera was operating and nothing put him

P.2d 527 (App. 1994).

² *State v. Emery*, 141 Ariz. 549, 688 P.2d 175 (1984).

³ 120 Ariz. 1, 583 P.2d 888 (Ariz. 1978).

⁴ *Id.* at 2, P.2d at 889.

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on notice that it was not operating properly. The trial court properly ruled that there was no bad faith on the part of the State. As previously noted, Appellant failed to support his claim of prejudicial error by the State for not preserving the videotape evidence of Appellant's sobriety - the second requirement of *Hannah* - as Officer Campbell could have testified at trial, as he did at the hearing, concerning Appellant's signs of sobriety.

In this case, the trial judge correctly concluded, as a matter of law that there was no bad faith on the part of the State, and no prejudicial impact on Appellant. This Court finds no error in the trial court's ruling.

IT IS THEREFORE ORDERED affirming the trial judge's ruling on Appellant's Motion to Suppress.

IT IS FURTHER ORDERED affirming the judgments of guilt and sentences imposed.

IT IS FURTHER ORDERED remanding this case back to the Phoenix Municipal Court for all further and future proceedings in this case.

/ s / HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT